Liquid Carriers Corp. *and* Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO. Case 2–CA–25535

October 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On April 28, 1993, Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision.

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union since on or about December 20, 1991, and by withdrawing recognition from the Union on about January 15, 1992, because the Respondent had a good-faith doubt, founded on sufficient objective evidence, of the Union's majority support. We disagree.

1. Facts

The Respondent operates barges transporting goods. The Union has represented a unit of the Respondent's employees since about 1950, and the parties have executed a series of collective-bargaining agreements, the most recent of which was effective by its terms from February 16, 1985, through February 15, 1988.[1] The parties were unable to reach a successor agreement and the Union commenced a strike on February 16, 1988.

In response to the strike, the Respondent hired permanent replacements. The Respondent paid these replacements lower wages and benefits than those contained in the expired contract.[2] On August 3, 1988, the Union filed an unfair labor practice charge in Case 2–CA–22969–1, alleging that the Respondent violated Section 8(a)(5) by refusing to bargain in good faith for a successor agreement and by making unilateral changes in conditions of employment.

On September 2, 1988, the Union, by letter, made an initial offer to return to work. While characterizing the offer as an unconditional one, the letter stated the employees would agree to return under the terms and conditions of the expired contract. The Respondent answered by letter dated September 23, 1988, and expressed the opinion that the offer to return was not an unconditional one and therefore need not be honored. The letter further indicated that if an unconditional offer was made, it would place the strikers on a preferential hiring list.

The Union brought up the subject of reinstatement at every bargaining session held with the Respondent. The Union's position throughout the negotiations was that the Respondent should immediately offer reinstatement to the strikers and discharge the replacements. The Respondent's consistent position was that it had hired permanent replacements whom it would not discharge and that it would place the strikers on a preferential hiring list to be reinstated as positions became open.

A second charge was filed on October 20, 1989, in Case 2–CA–23896, alleging that the strike was an unfair labor practice strike, that the Respondent had unlawfully refused to meet and bargain with the Union, and had unlawfully refused to reinstate the strikers. The parties continued to meet at various times to resolve the outstanding issues between them. A final meeting between the parties was held on February 27, 1991. The parties did not resolve either the terms of the contract or the recall rights of the strikers at this meeting.

The unfair labor practice cases were consolidated and tried before Administrative Law Judge Raymond P. Green, who issued a decision on August 30, 1991.[3] There, Judge Green found that the strike was an economic strike, that the Respondent had not refused to meet with the Union, and that the Respondent had not unlawfully refused to reinstate the economic strikers. He also found that since the Union demanded at all relevant times that the Respondent immediately reinstate all the strikers and terminate the permanent replacements it had hired, the Union had never made an unconditional offer to return to work.

Judge Green further found that the Respondent had violated Section 8(a)(5) by unilaterally changing certain terms and conditions of employment, but only insofar as they were applied to strikers returning before August 2, 1989, the date at which the parties reached impasse. The parties stipulated that only one employee

[1] The unit generally consists of the Respondent's employees working on the Respondent's barges. Although the record is unclear as to the exact unit description, there appears to be no dispute that the appropriate unit is set forth in the most recent collective-bargaining agreement between the parties.

[2] These changed terms and conditions of employment were applied to two of the strikers who returned to work during the strike. One employee returned to work around September 14, 1988, and the other returned around February 18, 1990.

[3] Judge Green's findings and conclusions and recommended Order were adopted by the Board by an unpublished Order on October 17, 1991.

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was due backpay under the Board's Order, Andrew Rogers.

The Board's notice was posted at the Respondent's place of business for 60 consecutive days beginning on November 20, 1991. The parties entered into a backpay stipulation pertaining to Rogers in late August 1992, agreeing to the amount owed and the terms of payment. When the Respondent withdrew recognition from the Union on January 15, 1992, it was approximately 4 days before the notice posting period would have been completed, and approximately 7 months before the parties agreed as to the backpay obligation and terms of payment due Rogers.

2. The withdrawal of recognition

As noted above, the Board's Order in the prior unfair labor practice proceeding was entered on October 17, 1991. On October 25, 1991, Albert Cornette, president of the Union, wrote to the Company requesting negotiations for a new labor agreement. The Union and Respondent initially agreed to meet on December 2, 1991, but the Respondent subsequently canceled that meeting. On December 20, Cornette again wrote the Respondent requesting negotiations. On January 15, 1992, the Respondent responded, stating ''[t]he Company has a good-faith doubt, based on objective considerations, of Local 333's majority support among its employees. Accordingly, the Company withdraws recognition . . . and declines to meet.'' The Union again requested negotiations on April 14, 1992. The Respondent replied on May 8, 1992, reiterating the Respondent's good-faith doubt, withdrawal of recognition, and refusal to meet and bargain.

Prior to the strike, the Respondent had eight employees, all of whom joined the strike. Of the eight strikers, four have never returned to work: Carbonaro, Alesi, Marotta, and Heaton. Employee Halliwell returned briefly and quit, and employee Velt retired in August 1988. Rogers, the employee due backpay in the prior unfair labor practice proceeding, returned after the strike, but was discharged in March 1990 for ''drinking on board the vessel.'' The eighth employee, Wohltman, returned to work, but has been on layoff since August 1991 and is on the Respondent's recall list.[4]

The Respondent had six employees working on January 15, 1992, the date of the withdrawal of recognition. These six employees were all permanent replacements hired after the strike began in 1988. In addition, the Respondent had six employees on layoff during the 6 months prior to January 15, 1992, one of whom was Wohltman. The other five employees on layoff were also permanent replacements.

3. The judge's conclusions

The judge noted that there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification. After the expiration of the certification year, the presumption of majority status continues, but may be rebutted. An employer who wishes to withdraw recognition after the certification year may do so in one of two ways: (1) by showing that the union did not in fact have majority status on the date that recognition was withdrawn, or (2) by presenting evidence of a sufficient objective basis for a good-faith doubt of the union's majority status at the time of withdrawal of recognition.

The judge then referred to the Board's decision in *Station KKHI*,[5] where the Board addressed the issue of whether any presumption can be made concerning the union sentiments of striker replacements. There, the Board determined that it will ''decline to maintain or create any presumptions'' regarding the union sentiments of striker replacements, and will require ''some further evidence of union non-support'' before it will conclude that an employer's claim of good-faith doubt is sufficient to rebut the overall presumption of continuing majority status.[6] The Board then found that, there, the respondent had not established sufficient evidence of objective considerations to support its withdrawal of recognition because the only factor presented was the hiring of five permanent replacements at a time when there were only three remaining strikers. The Board determined that this fact alone was insufficient to establish a good-faith doubt.

The judge further observed that the Supreme Court, in *Curtin Matheson Scientific, Inc*.,[7] found ''that the Board's refusal to adopt a presumption that striker replacements oppose the Union is rational and consistent with the Act.'' The judge noted, however, that in so finding, the Court stated that the Board has not found a union's demand that replacements be terminated to be irrelevant to its evaluation of replacements' attitudes toward the union, and specifically noted that in *Station KKHI* and *Curtin Matheson* there was no evidence that the union was actively negotiating for ouster of the replacements.[8]

The judge determined that in the present case the Respondent had a good-faith doubt, based on sufficient objective considerations, of the Union's majority support when it withdrew recognition on January 15, 1992. The judge cited the following factors in reaching this conclusion. First, he noted that when the strike

[4] During 1991 and 1992, the Respondent kept approximately eight permanent replacements on its work roster, but did not necessarily use all eight at one time. Those not working were on indefinite layoff and were subject to recall based on the Respondent's needs.

[5] 284 NLRB 1339 (1987).

[6] Id. at 1344–1345.

[7] 494 U.S. 775, 796 (1990).

[8] Id. at 792–793.

began on February 16, 1988, all eight employees joined the strike, and permanent replacements were hired. Further, no unconditional offer to return to work has ever been made. He then noted that as of January 15, 1992, only five of the eight striking employees were includable in the unit. (The four still on strike and the one on layoff.) He found that as of January 15, 1992, the Respondent had six permanent replacements working who were includable in the unit, as well as five permanent replacements on layoff status. Accordingly, the judge found that as of January 15, 1992, the permanent replacements constituted a clear majority of the unit.

The judge then noted that in the prior unfair labor practice proceedings the Board adopted Judge Green's findings that the Union's position throughout negotiations was that the Respondent should offer immediate reinstatement to all the strikers and discharge the replacements. The judge also noted that in the instant case Union President Cornette acknowledged at the hearing that he had ''previously referred to the permanent replacements at Liquid Carriers as scabs'' and as ''the waste matter that was excreted from an enema,'' and that as long as he lives he would refer to the permanent replacements as scabs. Cornette added: ''I think I was very kind to them with the statement.''

The judge found that the Union had repeatedly and actively campaigned for the replacements' ouster, and that the Union had acknowledged at the hearing its continuing strong dislike for and animosity toward the replacements. The judge concluded that these factors created a reasonable doubt that the replacements supported the Union on January 15, 1992.[9]

4. The parties' contentions

The General Counsel excepts to the judge's findings that the Respondent had a good-faith doubt of the Union's majority status, and asserts that the judge attributed unwarranted significance to the union president's demand that the replacements be terminated and to his dislike of and animosity towards the replacements. The General Counsel argues that an employer cannot withdraw recognition based solely on the fact that replacements outnumber strikers, and that here, the only ''further evidence of union non-support'' is the comments made by the Union's president expressing animosity toward the replacements and the Union's demand that the replacements be discharged. The General Counsel also specifically notes that the Respondent's withdrawal was not based on employee statements or manifested sentiments.

The Respondent maintains that it did not base its position solely on the number of replacements in the unit as compared to the number of strikers, but also relied on the evidence of the Union's attitude toward the replacements. The Respondent submits that it is immaterial that it did not rely on employee statements or manifest sentiments. The Respondent asserts that once it has established its reasonable belief that the Union lacked majority status the burden shifts to the General Counsel to prove that on the critical date the Union in fact enjoyed majority support, and that the General Counsel has failed to meet his burden of proof.

5. Analysis and conclusions

We agree with the General Counsel and find that the Union's antireplacement rhetoric and its request that the replacements be terminated do not establish objective considerations sufficient to support the Respondent's claim of good-faith doubt of the Union's majority status. The Board held in *Station KKHI* that no presumption can be made as to the union sentiments of replacement employees, and that further evidence of union nonsupport is required before the Board will conclude that an employer's claim of good-faith doubt is sufficient to refute the overall presumption of the union's continuing majority status.

The most persuasive evidence, of course, would consist of expressed, unsolicited indications from the majority of unit employees that they do not wish the union to represent them. Most cases, however, are not so straightforward. In the absence of direct indications of union nonsupport from a majority of employees, the employer may rely on statements or actions of nonsupport from less than a majority of employees, combined with circumstantial evidence which may indicate a loss of majority support for the union. Accordingly, the Board examines the circumstances in each case to see whether they lead to the conclusion that there is a reasonable basis for doubting the union's majority status. In so doing, the Board necessarily accords less weight to indirect, circumstantial evidence that involves no indication of actual employee sentiment than to employee statements or actions that directly indicate employee sentiments.[10]

[9] The judge also found that the withdrawal of recognition was not tainted by the unremedied unfair labor practices in Cases 2–CA–22969–1 and 2–CA–23896. At the time of the withdrawal, 3 or 4 days of the posting period remained, and agreement had not yet been reached on backpay. The judge noted that the one employee due backpay in the prior cases had returned to work after the strike, but was discharged in March 1990 for drinking on board the vessel, and that this discharge took place almost 2 years before the withdrawal. Thus, there was no evidence that the employees employed as of January 15, 1992, knew of the unilateral changes. Accordingly, the judge rejected the contention that the withdrawal of recognition was tainted and dismissed the complaint.

[10] Contrary to certain criticism directed at the Board in this area, the Board has never imposed a requirement that there be ''proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit'' in order for an employer to establish ''good faith doubt'' *Johns-Manville Sales Corp. v. NLRB*, 906

Continued

When, as here, a claim of good-faith doubt is not based on *any* direct indication from employees as to their disaffection with the union, the Board must be particularly diligent in its examination of the circumstantial evidence presented. In order for the Board to determine that circumstantial evidence *alone* provides a sufficient objective basis to support a good-faith doubt, the evidence must establish with a reasonable degree of certainty that there is an objective basis for doubting that the majority of unit employees desire representation by the union.

Here, the Respondent argues that the following facts are sufficient to overcome the overall presumption of the Union's continuing majority status and compel such a conclusion: (1) the majority of the employees in the unit are permanent striker replacements, (2) the Union has never abandoned its request that the strikers be rehired and the replacements be terminated, if necessary, and (3) the Union, through its president, has expressed a continuing animosity toward the replacements.[11] However, these facts alone do not demonstrate the kind of compelling circumstances that would reasonably allow us to conclude that this is an objective basis for doubting that a majority of employees in the unit support the Union.

There is no dispute that the mere fact that a majority of unit employees are striker replacements is insufficient to support a good-faith doubt.[12] Also insufficient to support a good-faith doubt is the fact that a union president has expressed his animosity toward the replacements by referring to them in unflattering terms. This is common strike rhetoric which reflects the fact that during a strike replacements are undermining that strike effort by enabling the employer to carry on its business. Replacements are typically aware of this enmity, and the Board has refused to impute to the replacement a lack of support for the union on this basis.[13] Further, in *Station KKHI*, the Board has already evaluated the impact of union hostility toward striker replacements in determining that the replacements should not be presumed to disfavor union representation.[14] It would be largely duplicative to utilize that factor again as ''further evidence of union nonsupport'' at this stage of the proceedings.

The judge found it significant that here the Union has demanded the immediate reinstatement of the strikers and the discharge of the replacements and that it has maintained this position throughout the strike. This fact, however, even taken together with the anti-replacement rhetoric described above, does not create the type of compelling circumstances that would support a conclusion that the employer has a reasonably based doubt that the union has lost its majority support among the unit employees. What the Respondent here appears to seek is a presumption that if a union seeks the replacements' discharge, then the replacements oppose the union. What the Board demands, however, is objective evidence establishing a good-faith doubt of loss of a union's majority status and not assumptions based on how others believe employees are likely to react. In the absence of any overt expressions of the replacements' union sentiments, there is uncertainty as to how replacements would react to a demand that the strikers be reinstated and the replacements discharged. But the existence of uncertainty is insufficient to raise a reasonable doubt of the union's majority status, particularly in the context of the overall presumption that an incumbent union continues to represent a majority of the unit employees.

In *I T Services*,[15] the Board ''assign[ed] some weight'' to the striker replacements' awareness during the strike of the union's continuing demand that they be discharged in finding that the respondent lawfully withdrew recognition from the union based on its good-faith doubt of the union's majority status. We note that in that case there was direct evidence in the form of employees' statements that they did not want the union to represent them, in addition to the fact that they were aware of the union's continuing demand for their termination. This direct evidence, together with the pervasive violence directed against the striker replacements during the strike, established a sufficient objective basis to support the respondent's claim of good-faith doubt of the union's majority status.

The Supreme Court in *Curtin Matheson* noted that ''the Board has not deemed . . . a union's demand that replacements be terminated irrelevant to its evaluation of replacements' attitudes toward the union.[16]'' However, the Court noted further that the Board does not consider this factor to be controlling in such an analysis, and the Court expressed no disagreement with the Board on this point. In fact, the Court approved the Board's approach of taking into account the particular circumstances surrounding each strike and the hiring of

F.2d 1428, 1432 (10th Cir. 1990); see also *Curtin Matheson*, 494 U.S. at 797 (Chief Justice Rehnquist, concurring).

[11] There is no evidence in the record that the replacements were called ''scabs'' to their faces, or that they were even aware of the Union's animosity toward them.

[12] *Station KKHI*, 284 NLRB at 1345.

[13] See *Station KKHI*, 284 NLRB at 1344–1345; *Johns-Manville Sales Corp*., 289 NLRB 358, 362 (1988). In *Station KKHI*, the Board determined that the respondent had not established sufficient objective considerations to support its withdrawal of recognition. At the time of the withdrawal, there was a majority of striker replacements in the unit. The Board found that it could not ascertain the replacement's sentiments either from their having crossed a peaceful and sporadic picket line or from the union's failure to contact the replacements, because these events are common to the hiring of replacements and ''do not adequately demonstrate the replacements' union sentiments.'' 284 NLRB at 1345.

[14] Id. at 1344.

[15] 263 NLRB 1183, 1183 fn. 1 (1982).

[16] 494 U.S. at 792–793.

replacements, while retaining its longstanding requirement that the employer must come forth with some objective evidence to substantiate its doubt of continuing majority status.[17]

As the Court recognized in *Curtin Matheson*, the extent to which a union demands displacement of permanent replacement workers logically will depend on the union's bargaining power. A union's leverage will vary greatly from strike to strike. Addressing those situations in which the union is weak, the Court in *Curtin Matheson* stated:

> Cognizant of the union's weak position, many if not all of the replacements justifiably may not fear that they will lose their jobs at the end of the strike. They may still want that union's representation after the strike, though, despite the union's lack of bargaining strength during the strike, because of the union's role in processing grievances, monitoring the employer's actions, and performing other nonstrike roles.[18]

Although this language pertains to the Court's finding that the Board's nonpresumption policy is rational, it is equally applicable to an analysis of whether an employer has sufficient objective considerations to support a good-faith doubt of the union's majority.

In the present case, the Union's initial demand that the replacement workers be terminated occurred over 3 years prior to the withdrawal of recognition. At the time of the withdrawal, the Union had not abandoned this demand, but none of the replacement workers had been displaced. Apparently, then, the replacement workers have had little to fear from this demand, even assuming they were aware of it. The Court itself recognized that ''a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union.''[19]

In addition, there are overriding policy considerations that support our finding that the Union's commonplace strike rhetoric and its position that replacements should be terminated do not in this case establish ''further evidence of union non-support.'' As noted by the Court in *Curtin Matheson*, ''[t]he Board's approach to determining the union views of the striker replacements is directed at [the goal of industrial peace,] because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes.''[20] If we were to consider a demand that strikers be returned to work, together with the type of strike rhetoric present in the instant case, to be sufficient evidence of replacements' union sentiments to support a withdrawal of recognition, we would run the risk of handing employers a union-free workplace the moment any strike enflamed the passions of the parties involved. If unions are to protect the interests of the employees they represent, they must be free to express their support for the employees' jobs and their displeasure with a threat to those jobs.

In sum, the only evidence presented by the Respondent is that the Union demanded, and never abandoned the demand, that the replacements be displaced, and that the union president described the replacements in unflattering terms. There is no evidence in this case of picket line harassment or violence, no statements of opposition to the union by replacements, no union resignations, and no evidence that the replacements had any reason to fear they would lose their jobs, despite the position of the Union. In these circumstances, we find that the evidence presented by the Respondent is not sufficient to overcome the presumption of continuing majority status enjoyed by the Union.

Moreover, there is no evidence that the replacements were even aware that the union president had called them scabs or requested that the strikers be reinstated and that the replacements be terminated, if necessary. If the replacements were unaware, they obviously had no opportunity to react. What the Respondent did, apparently, was to express doubt that the replacements would continue to support the Union if they had known of the Union's demands and statements. The Respondent's assumptions do not constitute objective evidence of loss of support and therefore cannot be relied on as a basis for withdrawing recognition.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union when it did not have sufficient objective evidence to support a good-faith doubt of the Union's majority support.[21]

CONCLUSION OF LAW

By withdrawing recognition from Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO, on January 15, 1992, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

[17] Id. at 793–794.

[18] Id. at 791.

[19] Id. at 792 (footnote omitted).

[20] Id. at 794.

[21] In light of our conclusion that the Respondent did not have a good-faith doubt of the Union's majority status on January 15, 1992, we find it unnecessary to pass on whether the unremedied unfair labor practice in Cases 2–CA–22969–1 and 2–CA–23896 would have been sufficient to taint the Respondent's alleged good-faith doubt.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to recognize the Union as the exclusive bargaining representative of its employees in the appropriate unit.

ORDER

The National Labor Relations Board orders that the Respondent, Liquid Carriers Corp., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive bargaining representative of the Respondent's unit employees as set forth in the parties' most recent collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its New York, New York facility copies of the attached notice marked ''Appendix.''[22] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO as the exclusive bargaining representative of our unit employees as set forth in the parties' most recent collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

LIQUID CARRIERS CORP.

Richard L. De Steno, Esq., for the General Counsel.
Stephen J. Sundheim and *Vincent J. Pentima, Esqs.*, for the Respondent.

DECISION

STATEMENT OF CASE

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in the above matter on January 21 and a complaint issued on June 22, 1992. The General Counsel alleges in his complaint that Respondent Employer has violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to bargain with the Union since on or about December 20, 1991, and by withdrawing recognition from the Union on or about January 15, 1992, during which time the Employer had not remedied outstanding unfair labor practices and was failing to meet and bargain with the Union.

Respondent Employer, in its answer, denies violating the Act as alleged. The Employer contends ''that its withdrawal of recognition on January 15, 1992 was entirely lawful because (1) the Company had a good faith doubt as to whether the Union represented a majority of its employees; (2) the Union in fact did not represent a majority of its employees; and (3) the presence of a partially remedied unfair labor practice did not taint this lawful withdrawal of recognition.''

A hearing was held on the issues raised in New York, New York, on February 17, 1993. On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Employer operates barges transporting goods and is admittedly engaged in commerce as alleged. The Union is

admittedly a labor organization as alleged. The Union has represented an appropriate unit of the Employer's employees since about late 1950, executing a series of collective-bargaining agreements. The most recent agreement was effective from February 16, 1985, through February 15, 1988. The parties were unable to agree upon the terms of a successor agreement and the Union commenced a strike on February 16, 1988. The Union thereafter filed unfair labor practice charges against the Employer which were litigated before Administrative Law Judge Raymond P. Green in Cases 2–CA–22969–1 and 2–CA–23896. The judge's findings and conclusions and recommended Order, which issued on August 30, 1991, were adopted by the Board on October 17, 1991. (See G.C. Exhs. 2(a) and 2(b).)

The judge dismissed complaint allegations in the above cases pertaining to, inter alia, the Employer's alleged refusal to meet and bargain with the Union and refusal to reinstate the strikers. The judge found that ''the strike . . . started out as an economic strike''; ''was not converted to an unfair labor practice strike''; and, further, the Employer did not unlawfully refuse to reinstate the strikers. The judge explained:

> [T]he Company did not refuse to meet and bargain prior to the strike's commencement. . . . Accordingly, I conclude that the strike . . . started out as an economic strike. . . . The only unfair labor practice in the present case [as discussed below] was the unilateral change in working conditions as applied to, at most, two returning strikers. . . . [T]he strike was not converted into an unfair labor practice strike. . . . There was no evidence presented that the employees . . . knew of the unilateral changes and there was no evidence that the Union manifested any intention to prolong the strike on this account. . . . When the strike commenced, the Employer hired permanent replacements. . . . As it is concluded that the Union demanded at all relevant times that the Employer immediately reinstate all the strikers and get rid of the replacements, I hold that the Union did not make an unconditional offer to return to work on behalf of the strikers.

With respect to the Employer's alleged unilateral changes in terms and conditions of employment, the judge found:

> The evidence establishes that on or about February 16, 1988 the Company, in response to the strike, hired permanent replacements. It is conceded that the Company, at the same time, paid these replacement employees lower wages and benefits than those contained in the expired contract. It is also conceded that in relation to two of the strikers who returned to work during the course of the strike, that these changed terms and conditions of employment applied to them. One of the former strikers returned during the payroll period ending September 4, 1988 and the other returned during the payroll period ending February 18, 1990.

The judge concluded:

> Respondent violated Section 8(a)(5) by unilaterally changing terms and conditions of the expired contract but only insofar as they were applied to returning strikers. Also, it is my opinion that the evidence shows that a true impasse was reached after . . . August 2, 1989 [and] any remedy for this violation should take into account that after that date the Company would be permitted to implement all or part of its last offer.

The Order directed, inter alia, that the Employer cease and desist from ''unilaterally changing the terms and conditions of employment for returning strikers absent an impasse in negotiations'' and like or related conduct; make whole returning strikers as limited above; and post the attached notice.

It was stipulated that the Board's notice in the above cases was posted for 60 consecutive days commencing on November 20, 1991. Thus, the full notice posting period had not expired by January 15, 1992, when the Employer withdrew recognition in this case. (See G.C. Exh. 3.) Further, it was also stipulated that only one employee, A. Rogers, was in fact due backpay as a consequence of the above Order, which moneys had not been paid by January 15, 1992. As discussed below, Rogers had returned to work during the strike and was later discharged by the Employer for ''drinking on board the vessel.'' The parties entered into a backpay stipulation pertaining to Rogers during late August 1992, agreeing to the backpay obligation and terms of payment. (See G.C. Exh. 4.)

As noted, the Board's Order in the prior proceedings was entered on October 17, 1991. On October 25, 1991, Union President Albert Cornette wrote Vice President Company Leo Cardillo that the Union ''wishes to commence negotiations for a new labor agreement immediately as ordered by the National Labor Relations Board.'' Cornette was ''available'' on November 20 and on various dates in December. (See G.C. Exh. 5(a).) Vincent Pentima, counsel for the Employer, responded on October 29 (G.C. Exh. 5(b)):

> [W]e are available to meet with you on December 2 or December 4, 1991. Please call me so that we can make arrangements if either of these days is acceptable. Also, your assertion that the NLRB ordered commencement of these negotiations is incorrect.

Cornette wrote Pentima on October 29 (G.C. Exh. 8(a)), indicating that ''[W]e are available to meet . . . on December 2.'' On November 26, however, Pentima wrote Cornette (G.C. Exh. 8(b)), stating that ''Our meeting scheduled for December 2 needs to be cancelled'' and ''I will contact you shortly regarding the status of Liquid Carriers.''

Cornette again wrote Cardillo on December 20 (G.C. Exh. 5(c)), stating that ''[o]nce again I am requesting that you commence negotiations for a new labor agreement.'' Cornette proposed meeting dates in January 1992. On January 15, 1992, Pentima wrote Cornette (G.C. Exh. 5(d)):

> We have received your letter of December 20 . . . renewing your request of October 25 . . . that [the Employer] commence negotiations with Local 333 for a new contract.
>
> The Company has a good faith doubt, based on objective considerations, of Local 333's majority support among its employees. Accordingly, the Company withdraws recognition . . . and declines to meet.

Thereafter, on April 14, Cornette again wrote Cardillo renewing his request to meet and bargain. (See G.C. Exh.

5(e).) Pentima again replied on May 8 restating the Employer's ''good faith doubt,'' withdrawal of recognition, and refusal to meet and bargain. (See G.C. Exh. 5(f).)

Union President Cornette supplemented the above-documentary evidence by testifying that he ''believe[d] [he] spoke to Pentima . . . on December 2nd.'' Cornette recalled:

> I had been apprised that I had received a letter from Pentima canceling out December 2nd and December 4th. And on December 2nd, that morning when I arrived in my office, there was a . . . phone call message from Pentima for me to call him, that the meeting was canceled. So I immediately called Pentima and then he explained to me that they had to cancel the meeting because Cardillo was not available. And then Vince [Pentima] said he would get back to me to reschedule the meetings for negotiations.

Cornette added:

> On December 13th, not hearing from Pentima . . . I called him. . . . He [Pentima] said he has to talk to Cardillo and he would get back to me with new dates. But he says, I don't know Al, I think there is a question as to whether the Company will recognize the Union or whether we represent the men. But anyway I'll speak to Vince [sic] about the new date and I'll get back to you.

On cross-examination, Cornette acknowledged that he had in fact been notified on November 26 that the December 2 meeting would be canceled. (See G.C. Exh. 8(b) quoted above.) Cornette also acknowledged that his prehearing affidavit makes no reference to a December telephone conversation with Pentima. Further, Cornette acknowledged that he had ''previously referred to the permanent replacements at Liquid Carriers as scabs'' and ''the waste matter that was excreted from an enema''; and that ''as long as [he] live[s] [he] will refer to them as scabs.'' Cornette added: ''I think I was very kind to them with that statement.''

Matt Cardillo was the operations manager for the Employer during the pertinent time period. The Employer ''operated zero to four barges depending on . . . the work load.'' During 1991 and 1992 the Employer ''kept approximately eight employees on the roster, but [was not] necessarily using all eight at any one time . . . some of them might be on layoff.'' Cardillo explained that ''we would take a pool of employees and assign them the units as necessary to perform the jobs from our customers''; ''if I had no work for the barges the employees would be laid off subject to recall at a latter date when I would have more work for them.'' An employee could remain on ''layoff'' status for an ''indefinite'' time period. Cardillo added: ''we would recall an employee based on his experience with the particular job that we were going to do''; his familiarity with the vessel involved; his ''license'' qualifications; and his ''availability.''

Cardillo testified that prior to the strike, which commenced on February 16, 1988, the Employer had eight employees. These employees joined the strike and, as found in the earlier proceedings, the Employer hired ''permanent replacements'' for the strikers. Respondent's Exhibit 3 lists the Employer's employees prior to the commencement of the strike:

M. Carbonaro	W. Halliwell
C. Alesi	R. Velt
F. Marotta	A. Rogers
J. Heaton	D. Wohltman

Cardillo noted that Carbonaro, Alesi, Marotta, and Heaton have not returned to work ''since the strike'' started. Halliwell returned ''briefly'' ''since the strike'' started for a 2-week period and announced that he ''would not be returning after that'' because ''he was not happy with the differential in pay''; he ''quit.'' Velt ''retired'' in August 1988. (See R. Exh. 2 and the testimony of Frances Malone. (Tr. 65–74.)) Rogers returned ''after the strike'' started but was ''discharged'' in March 1990 for ''drinking on board the vessel.'' Wohltman returned ''after the strike'' started but was ''laid off'' in August 1991 and is on the ''recall list.''

Cardillo next testified that the Employer had six employees working on January 15, 1992, the date it withdrew recognition from the Union, as shown on Respondent's Exhibit 4:

J. Benner	G. Warren
L. English	M. Warren
Daniel Warren	G. Vermilyea

The above six employees were ''permanent replacements'' hired after the strike began in 1988. In addition, Cardillo noted that the following four employees were on ''layoff'' status during the 6 months up to January 15, 1992, as shown on Respondent's Exhibit 5:

W. English	David Warren
M. Gordner	D. Wohltman

Cardillo explained that ''English, Gordner and Warren were all hired originally after the strike began'' as ''permanent replacements'' and ''Wohltman had been originally hired prior to the strike''—''he was working prior to the strike and returned.'' Cardillo ''expected'' to recall the employees listed on the General Counsel's Exhibit 5 in accordance with his ''policy in operation for years.''[1]

Vincent Pentima, an attorney for the Employer, testified that he canceled the ''meeting scheduled for December 2'' because ''sometime around or before November 26 . . . it occurred to me that there might be a question as to whether or not the Union had majority status.'' Pentima had ''absolutely no recognition of talking to'' Cornette on December 2, although he admittedly did speak with Cornette on December 13. Pentima added:

[1] Cardillo noted that he had in fact recalled Daniel Warren and J. Benner ''the first week of 1992,'' listed on R. Exh. 4. He also had recalled David Warren after January 15, 1992, listed on R. Exh. 5. In addition, Cardillo explained that there were two other employees, D. Diltz and T. Sturgis, who were also on ''layoff'' as of January 15, 1992, and are not listed on R. Exh. 5. They had been laid off during 1991. Diltz was laid off in April 1991 and later recalled after January 15, 1992. Sturgis was laid off in July 1991 and has not been recalled.

> I looked at my phone records and [December 2] wasn't listed . . . the 13th was. So, I just can't say I never had a phone call with him, but I can say that I never said to Al [Cornette] in any conversation in December that I was canceling the meeting because Leo was not available and I would call him back for another meeting. . . . I deny ever saying that.

Pentima noted that on December 13:

> Al called me and asked when we were going to meet and what did I mean by the letter that I sent. And I told him that I had a question in my mind whether or not the Union was still representing the majority of employees and, if they were not, then the Company would no doubt withdraw recognition. And Al said okay, that's what I thought the letter meant. And I told him that I would be back to him on it.

Pentima, as he further testified,

> met with some of the Company people . . . and went through some records in January. Having done that, we felt comfortable that the number of replacement workers employed by the Company [was] more than the number of strikers who would have reinstatement eligibility if an unconditional offer was ever made.

Pentima later dispatched his letter of January 15, as quoted above.[2]

Discussion

In *Station KKHI*, 284 NLRB 1339 (1987), the Board explained:

> Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain. [Citations omitted.]

Further, ''[t]here is, in effect, a corollary to the presumption of continuing majority status which is that the Board presumes that, generally, at least a majority of *new* employees support the union.''

The Board then addressed any ''presumption concerning strike replacements'' in *Station KKHI*, stating:

> [W]e can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require ''some further evidence of union non-support'' . . . before concluding that an employer's claim of good faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

The Board concluded in *Station KKHI*:

> Respondent has not established sufficient evidence of objective considerations to support its withdrawal of recognition from the union. The only factor presented by the respondent is its hiring of five permanent replacements at a time when there were only three remaining strikers. This fact, by itself, is insufficient to establish a good faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the union's failure to contact the replacements during the strike. Rather, more evidence would be required to support a good faith doubt, as these events, common to the hiring of replacements, do not adequately demonstrate the replacements' union sentiments.

The United States Supreme Court, in *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775 (1990), held ''that the Board's refusal to adopt a presumption that striker replacements oppose the union is rational and consistent with the Act.'' The Court, however, noted:

> [T]he Board has not deemed picket line violence or a union's demand that replacements be terminated irrelevant to its evaluation of replacements' attitudes toward the union. The Board's position, rather, is that ''the hiring of permanent replacements who cross a picket line, *in itself*, does not support an inference that the replacements repudiate the union as collective bargaining representative.'' In both *Station KKHI* and this case, the Board noted that the picket line was peaceful . . . and in neither case did the employer present evidence that the union was actively negotiating for ouster of the replacements.

In addition, the Board has made clear that ''an employer may not assert a good faith doubt as to majority status in a context where employee defections are attributable to unremedied unfair labor practices.'' *Columbia Portland Cement Co.*, 303 NLRB 880 (1991). See also *Riverside Cement Co.*, 305 NLRB 815 (1991), where the Board noted that the ''withdrawal did not occur in a context free of substantial unfair labor practices.'' Cf. *Master Slack Corp.*, 271 NLRB 78 (1984).

In the instant case, I find and conclude that on January 15, 1992, when the Employer withdrew recognition from the Union, the Employer had a good-faith doubt, founded on sufficient objective evidence, of the Union's majority support. Thus, the Union commenced an economic strike against the Employer on February 16, 1988. At the time, the Employer

[2] The evidence of record, insofar as pertinent here, is essentially undisputed. There are, however, some conflicts in testimony. I credit the testimony of Malone, Cardillo, and Pentima as recited above. Their testimony is substantiated in part by uncontroverted documentary evidence. And, they impressed me as trustworthy and reliable witnesses. Insofar as the testimony of Cornette differs with the testimony of Malone, Cardillo, and Pentima, I credit the testimony of the latter witnesses as more complete, reliable, and trustworthy. Cornette's testimony was incomplete and he did not impress me as a reliable witness.

employed eight unit employees who then joined the strike. No unconditional application to return to work has been made on their behalf. The Employer hired ''permanent replacements'' for the strikers. The eight striking unit employees were Carbonaro, Alesi, Marotta, Heaton, Halliwell, Velt, Rogers, and Wohltman. Operations Manager Cardillo credibly testified that Carbonaro, Alesi, Marotta, and Heaton have not returned to work ''since the strike'' started. Halliwell returned after the strike started ''briefly'' for a 2-week period and announced that he ''would not be returning after that'' because ''he was not happy with the differential in pay''; he ''quit.'' Velt ''retired'' in August 1988. Rogers returned ''after the strike'' started but was ''discharged'' in March 1990 for ''drinking on board the vessel.'' Wohltman returned ''after the strike'' started but was ''laid off'' in August 1991 and is on the Employer's ''recall list.'' In sum, as of January 15, 1992, only five of the eight striking employees were includable in the unit. The remaining three, who had abandoned the strike and crossed the picket line, had later ''quit,'' been ''discharged'' or ''retired'' and otherwise had no reasonable expectancy of recall.

In addition, as of January 15, 1992, the Employer had six ''permanent replacement'' employees working who were also includable in the unit. They were Benner, L. English, Vermilyea, Daniel Warren, Gerald Warren, and Marlene Warren. Operations Manager Cardillo credibly testified that these six employees were ''permanent replacements'' hired after the strike began in 1988. Further, Cardillo credibly testified that four employees were on ''layoff'' status during the 6 months up to January 15, 1992. They were W. English, Gordner, David Warren, and Wohltman. Cardillo credibly explained that ''English, Gordner and Warren were all hired originally after the strike began'' as ''permanent replacements'' and ''Wohltman had been originally hired prior to the strike''—''he was working prior to the strike and returned.'' Cardillo ''expected'' to recall these employees in accordance with his ''policy in operation for years.'' And, Cardillo also credibly explained that there were two other employees, Diltz and Sturgis, who were similarly on ''layoff'' status as of January 15, 1992.

Accordingly, the credible evidence of record sufficiently shows that as of January 15, 1992, the ''permanent replacements'' constituted a clear majority of the unit.

In the prior proceedings, the Board adopted the findings of the judge that the ''Union's position throughout the negotiations, including the period after formal meetings were held, was that the Employer should offer immediate reinstatement to all of the strikers and discharge the replacements''—''the Union demanded at all relevant times that the Employer reinstate all of the strikers and get rid of the replacements.'' Later, during the instant proceeding, Union President Cornette acknowledged that he had ''previously referred to the permanent replacements at Liquid Carriers as scabs'' and ''the waste matter that was excreted from an enema''; and that ''as long as [he] live[s] [he] will refer to them as scabs.'' Cornette added: ''I think I was very kind to them with that statement.''

Under these circumstances, I am persuaded that the Employer had a good-faith doubt, founded on sufficient objective evidence, of the Union's majority support. The ''permanent replacements'' constituted a clear majority of the unit. The Union had repeatedly and actively campaigned for their ouster. And, the Union acknowledged its continuing strong dislike and animosity toward the ''replacements.'' The Employer, on this record, reasonably doubted that the ''replacements'' supported the Union on January 15, 1992. The Employer has therefore established sufficient evidence of objective considerations to support its withdrawal of recognition from the Union.[3]

Further, while it is true that ''an employer may not assert a good faith doubt as to majority status in a context where employee defections are attributable to unremedied unfair labor practices'' and such ''withdrawal'' must ''occur in a context free of substantial unfair labor practices'' nevertheless, this record fails to support any claim that the instant ''withdrawal'' was thus ''tainted.'' See cases cited supra. As noted, in the prior proceedings, the Board adopted the judge's findings and conclusions that

> Respondent violated Section 8(a)(5) by unilaterally changing terms and conditions of the expired contract but only insofar as they were applied to returning strikers. Also, it is my opinion that the evidence shows that a true impasse was reached after . . . August 2, 1989 . . . [and] any remedy for this violation should take into account that after that date the Company would be permitted to implement all or part of its last offer.

The Order directed, inter alia, that the Employer cease and desist from ''unilaterally changing the terms and conditions of employment for returning strikers absent an impasse in negotiations'' and like or related conduct; make whole returning strikers as limited above; and post the attached notice.

It was stipulated that the Board's notice in the above cases was posted for 60 consecutive days commencing on November 20, 1991. Thus, the full notice posting period had not fully expired by January 15, 1992, when the Employer withdrew recognition in this case. Further, it was also stipulated that only one employee, A. Rogers, was in fact due backpay as a consequence of the above Order, which moneys had not been paid by January 15, 1992. As discussed below, Rogers had returned to work during the strike and was later discharged by the Employer for ''drinking on board the vessel.'' The parties entered into a backpay stipulation pertaining to Rogers during late August 1992, agreeing to the backpay obligation and terms of payment.

I do not find the January 15, 1992 ''withdrawal'' ''tainted'' by the fact that approximately 3 or 4 days remained to run during the notice posting period and agreement had not yet been reached on backpay with respect to the one employee thus affected. That one employee, Rogers, had returned ''after the strike'' started but was ''discharged'' in March 1990 for ''drinking on board the vessel,'' almost two years before the ''withdrawal.'' And, ''a true impasse was reached after . . . August 2, 1989 . . . after that date the Company would be permitted to implement all or part of its last offer.'' Thus, the unfair labor practice found occurred no later than August 1989; the one employee affected was ''discharged'' in March 1990; and, as the judge found: ''[t]here was no evidence presented that the employees . . . knew of the unilateral changes.'' I therefore reject this contention.

[3] In view of this finding, it is unnecessary to consider counsel for Respondent's further contention that ''the Union in fact did not represent a majority of . . . employees.''

Accordingly, I would dismiss the instant complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. Charging Party Union is a labor organization as alleged.

3. Respondent has not engaged in the unfair labor practices alleged and the complaint will be dismissed in its entirety.

[Recommended Order for dismissal omitted from publication.]

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